Korir v Republic (Criminal Appeal E007 of 2023)
[2024] KEHC 9474 (KLR) (16 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9474 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E007 OF 2023

RL KORIR, J

JULY 16, 2024

BETWEEN

TITUS KIBET KORIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Criminal Case Number E275 of 2023 by Hon. L. Kiniale in the Senior Principal Magistrate's Court at Bomet)

JUDGMENT

1. The Appellant was charged for the offence of arson contrary to section 332(a) of the *Penal Code*. The particulars of the offence were that on February 28, 2023 at around 2200 hours in Motiret village, Kabungut Sub-Location, Singorwet Location within Bomet County, the Appellant wilfully and unlawfully set fire to a dwelling house valued at Kshs 250,000/= belonging to Varsity Chepkorir.

2. The Appellant was convicted on his own plea of guilty and was sentenced to serve 20 years imprisonment.

3. Being dissatisfied with the conviction and sentence delivered on 2nd March 2023, Titus Kibet Korir through his Petition of Appeal filed on 14th march 2023 appealed against the conviction and sentence and relied on the following grounds reproduced verbatim:-

    i. That I pleaded guilty to the charges on plea taking.

    ii. That the learned trial Magistrate erred in both law and facts by not cautioning me on the consequences of pleading guilty.

    iii. That the learned trial Magistrate erred in law and fact by not considering that the plea of guilty entered was not unequivocal.

iv. That the learned trial Magistrate erred in law and in fact in failing to observe that there were threats, intimidations or blackmail.

v. That the learned trial Magistrate erred in law and in fact in convicting the Appellant to a harsh and excessive sentence based on circumstances and violated the provisions of Article 50 (2) of the *Constitution* of Kenya, 2010.

4. This being the first appellate court, I have a duty to re-evaluate the evidence on record. This was succinctly stated in *Odhiambo vs Republic* Cr. App No. 280 of 2004 (2005) 1 KLR where the Court of Appeal held that:-

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."

5. On October 5, 2023, I directed that this Appeal be canvassed by way of written submissions.

The Appellant's Written Submissions.

6. In his undated submissions filed on October 9, 2023, the Appellant submitted that the 20 year sentence was harsh yet he admitted to the charge. That he was a sole breadwinner of his family, a first offender and that his children depended on him for their food, clothing, shelter and school fees. He further submitted that the mother to his children abandoned them a long time ago when they were still young.

7. It was the Appellant's submission that this court had the powers to hear and determine infringement of fundamental rights. It was his prayer that this court grants him a lenient sentence and factors in the provisions of section 333(2) of the *Criminal Procedure Code*.

8. In his further undated submissions filed on 29th February 2024, he asked this court to grant him a non-custodial sentence as envisaged in Article 50(2) (p) (q) of the *Constitution* of Kenya. The Appellant submitted that he was under medication for ulcers and requested this court to allow him complete the remainder of his sentence at home.

The Respondent's Written Submissions.

9. The Respondent filed a Notice of Concession on Sentence dated July 24, 2023.

10. The Respondent submitted that the Appellant pleaded guilty on the first day of his arraignment and he saved the State's resources and judicial time. That on the material day, the Appellant arrived home drunk and thought someone was inside the house talking to his children. The Respondent further submitted that if a common drunk villager arrived at his home and found strangers, he would behave in the same way the Appellant behaved. The Respondent urged the court to be guided by section 119 of the *Evidence Act*.

11. It was the Respondent's submission that the Appellant released his family from the house before he torched it and thus there were no injuries or casualties. That the Appellant had asked for forgiveness and leniency.

12. The Prosecution submitted that the 20 year sentence was on the higher side. That because the main purpose of the sentence was to rehabilitate, they would not object to a reduction of the sentence or allow the Appellant to go return to his family.

13. I have gone through and given due consideration to the trial court's proceedings, the undated Petition of Appeal filed on March 14, 2023, the undated Appellant's Written Submissions filed on October 9, 2023 and February 29, 2024 and the Respondent's Notice of Concession of Sentence dated July 24, 2023. The two issues arise for my determination are:-

    i. Whether the plea was unequivocal

    ii. Whether the sentence was harsh and excessive.

Whether the Plea was Unequivocal.

14. I have noted that the Appellant was unrepresented during the trial and that one of his grounds of Appeal was that the plea he entered was equivocal. To ensure that the Appellant was accorded a fair trial in accordance to Article 50 of the *Constitution* of Kenya, I shall relook the plea process in the trial court.

15. The process of plea taking is provided under Section 207(1) and (2) of the *Criminal Procedure Code* which states :-

    (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;

    (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

        Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

16. In the case of *Omollo vs Republic* (Criminal Appeal E031 of 2023) [2024] KEHC 2664 (KLR) (14 March 2024) (Judgment), Mrima J. held:-

    " The process of plea taking is one that must be guarded jealously with strict adherence to procedure lest an accused person loses their liberty summarily.

    In Criminal Appeal 365 of 2011, *John Muendo Musau -vs- Republic* [2013] eKLR, the Court of Appeal, in reference to the decision in *Adan -vs- Republic* discussed the process of plea taking as follows;

    (5) On this argument, we wish to state that we have outlined the procedure followed before the trial court at the time of taking the plea. The legal principles to be applied in plea taking in all criminal cases were well enunciated in the locus classicus case of *Adan vs Republic* [1973] EA 445 where the Court held: -

    (i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

    (ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

    (iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."

17. I have gone through the trial court proceedings and I have noted that the Appellant took plea on March 2, 2023 when the substance of the charge was read and explained to him in a language he understood and he replied "it is true", a response which was recorded by the trial court and a plea of guilty entered. The trial court cautioned him on the seriousness of the charges before the facts were read out to him

18. The facts were read out to him and the Appellant stated that the facts were true. The trial court cautioned him again on the seriousness of the offence and the Appellant confirmed that the facts were true. He was consequently convicted on his own plea of guilty.

19. The importance of a court cautioning unrepresented suspects who face serious charges and plead guilty cannot be overstated. I find concurrence with Kemei J. in *Francis Macharia Nzeki vs Republic* (2021) eKLR, where he stated:-

> "Again the courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty as held by Joel Ngugi J. in *Simon Gitau Kinene v Republic* [2016] eKLR as well as in the case of *Paulo Malimi Mbusi v R* Kiambu Crim. App. No. 8 of 2016 (unreported) quoted by the learned judge ,the court held that where an unrepresented accused person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the accused understands the consequences of such a plea is heightened....."

20. I have keenly gone through the trial record and I have noted that the trial court adopted the proper procedure in recording the plea. The Appellant understood the charges and the facts and admitted them. He had every opportunity to inform the court that the particulars of the charge or facts were not true even after being cautioned but he did not.

21. It is salient to note that a guilty plea can be overturned at the mitigation stage if the Accused at mitigation submits and contradicts what he had pleaded guilty to or admitted to. In the event of such an occurrence, the trial court should change the plea to a not guilty plea. The Court of Appeal in the case of *John Muendo Musau vs Republic* (2013) eKLR observed: -

> "We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence."

22. I have considered the Appellant's mitigation in the trial court. His submissions did not negate any facts of the case.

23. Flowing from the above, it is my finding that the Appellant's plea was unambiguous and unequivocal and the Appellant was properly convicted of the offence of arson.

Whether the Sentence was Harsh and Excessive

24. In *Nelson Ambani Mbakaya vs Republic* (2016) eKLR, the Court of Appeal stated that:-

> " Sentencing of an accused person after conviction involves the exercise of discretion by the trial court. That discretion must of course be exercised judiciously rather than capriciously, depending on the circumstances of each case. As what is challenged in this appeal is essentially the exercise of discretion by the trial court, this Court is normally slow to interfere with that exercise of discretion unless it is demonstrated that the trial court acted on the wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive....."

25. The Appellant was charged and convicted of the offences of arson. Section 332 of the *Penal Code* provides that:-

Any person who wilfully and unlawfully sets fire to—

(a) any building or structure whatever, whether completed or not; or

(b) any vessel, whether completed or not; or

(c) any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or

(d) a mine, or the workings, fittings or appliances of a mine, is guilty of a felony and is liable to imprisonment for life.

26. The Appellant was sentenced to 20 years for an offence which carried a sentence of life imprisonment.

27. I have considered the circumstances of the case and I have noted that the Appellant found his wife (complainant) in the company of two children and two neighbours and picked a fight with his wife. He locked all of them inside the house and threatened to torch the house. He however allowed them to leave the house before he torched the house.

28. Strangely, the Respondent through the learned Prosecution Counsel submitted that any drunk villager would have behaved the same way that the Appellant conducted himself in setting ablaze his house. This court finds such submission very disturbing as it appears to excuse the conduct of the Appellant on account of drunkenness and down play a serious felony of arson.

29. The Appellant submitted that the 20 year sentence was harsh. That he had pleaded guilty at the earliest opportunity and further that he was the sole bread winner of his family and desired to go and take care of his family

30. As part of his mitigation the Appellant asked the court to consider that he had been forgiven by his family. On record are minutes of a clan meeting held on September 4, 2023 where a cleansing ceremony was held between the family members and clan elders. The minutes indicated that the clan members and family traced a long history of arson incidents in the family and purposed to stop the curse. That a cleansing ceremony was done and hands were shaken as a sign of reconciliation and forgiveness. The minutes also indicated that the Appellant's father had built a new house for the Appellant's family as per the clan elders' instructions. A photograph of a newly built house was attached to the minutes.

31. Having considered the Appeal, the Appellant's Submissions, the minutes of the clan meeting and the Respondent's willingness to have the Appellant's sentence reduced, it is my view that the Appellant deserves the mercy of this court. I have also considered the fact that the Appellant evacuated his wife, children and two neighbours before setting the house ablaze.

32. This court applauds the spirit of reconciliation because the offence was committed in the family set up. Even at the level of appeal this court is of the view that the reconciliation was a welcome move in the circumstances of this case. The complainant was the Appellant's wife and their family had been rendered homeless by the senseless burning of their home. Nonetheless, the family was said to have forgiven him.

33. In *Republic Vs. Priscilla Cherono Chebet & 2 others*, Nairobi Criminal Case No. 65 of 2011(- eKLR) the court stated:-

> " It is my considered view that reconciliation ought to be given visible and viable space in the criminal justice system as envisaged by Article 159 of the *Constitution*. For both the offender and victims, genuine reconciliation brings closure to the loss however heinous the crime committed may have been. Reconciliation is even more critical where both the offenders and the victims are family, relatives neighbours or friends. It therefore behooves the courts where the circumstances of a case permit, to promote reconciliation alongside penal sanctions. In my view, reconciliation speaks to the humanity of the offender and of the victim(s) while penal sanctions speak to society's condemnation of the offender and the offence and the two ought to work in tandem."

34. The Appellant has been in prison since March 2, 2023 when he was sentenced. He must have learnt his lesson and was ready to be reintegrated back to the society. It is the view of this court however that he merits close monitoring and coercive encouragement to remain lawful and keep the peace.

35. In the end, I set aside the 20-year prison term and substitute therefore a suspended sentence of 2 years imprisonment. The Appellant is set at liberty forthwith and shall be arrested and taken into prison to serve the term if he commits any offence during the said period.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 16TH DAY OF JULY, 2024

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant acting in person, Mr. Njeru for the State and Siele (Court Assistant)